IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
December 4, 2003 Session

STANLEY DESGRANGES DBA STANLEY'S EXCAVATING v. GORDON L. MEYER, ET AL.

Appeal from the Circuit Court for Knox County
No. 1-680-02 Dale C. Workman, Judge

FILED MAY 11, 2004

No. E2003-02006-COA-R3-CV

The primary and dispositive issue before us is one of first impression in Tennessee. We are asked to decide whether false statements made in a notice of lien duly served on the property owners, properly filed for recordation, and thereafter followed by the timely filing of a suit to enforce the lien, all pursuant to the provisions of Tenn. Code Ann. § 66-11-101, *et seq*., are absolutely privileged. We hold that, in such a case, the statements in the lien are made in the course of a judicial proceeding, are absolutely privileged, and, hence, cannot form the basis for a suit for damages on a libel of title theory. We reverse the judgment of the trial court holding to the contrary and dismiss the original defendants' counterclaim seeking damages for libel of title.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Reversed; Complaint Dismissed; Case Remanded

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., E.S., and D. MICHAEL SWINEY, J., joined.

W. Turner Boone, Knoxville, Tennessee, for the appellant, Stanley Desgranges dba Stanley's Excavating.

J. Ford Little and Stephanie K. Hunt, Knoxville, Tennessee, for the appellees, Gordon L. Meyer and Karen Renee Meyer.

OPINION

I.

Gordon L. Meyer and his wife, Karen Renee Meyer (collectively "the Meyers"), owned a parcel of land in Knox County. The Meyers approached Stanley Desgranges, who did business as Stanley's Excavating ("the lienor"), and attempted to hire him to grade their property for a horseback riding arena. After the lienor declined the Meyers' request, the Meyers orally contracted with Paul Randall Satterfield to do the grading. After Satterfield completed the work, the Meyers refused to pay him because his work was, according to them, "poor" and "lousy." When the Meyers refused to pay Satterfield, the lienor, in his own name and acting on his own behalf, served a notice of contractor's lien on the Meyers and filed it for recordation in the Register of Deeds' Office. The lien is expressly related to a debt allegedly owed by the Meyers to the lienor. The recorded lien includes the following statements:

> NOTICE IS HEREBY GIVEN, pursuant to the provisions of TENN. CODE ANN. §§ 66-11-101, *et seq*., that Stanley Desgranges d/b/a Stanley's Excavating ("Contractor"), whose principal place of business is at 2204 Diggs Road, Knoxville, Tennessee 37932, claims and holds a lien upon certain real property located in Knox County, Tennessee and owned by Gordon L. and Karen Renee Meyer ("Owner"), which real property is commonly identified as the property located at 2404 East Gallaher Ferry Road, Knoxville, Tennessee . . . .
>
> Said lien is claimed to secure the payment of the sum of Four Thousand Eight Hundred Dollars ($4,800.00) for the supply of labor and/or materials by Contractor for the improvement of the Property pursuant to a direct contract with Owner, and also for the expenses of recording this lien in the Register's Office for Knox County, Tennessee. Said amount is due, owing and unpaid, after allowing all just credits and deductions. This notice is given and filed within the time prescribed by law.

(Capitalization in original). Sometime after the notice of contractor's lien was served on the property owners and placed of record in the Register of Deeds' Office, the lienor timely filed suit against the Meyers in chancery court seeking a writ of attachment, enforcement of his contractor's lien, and other relief. The lienor alleged in his complaint that (1) he had a contract with the Meyers and (2) that Satterfield was his subcontractor.

The Meyers responded to the complaint, denying that they had a contract with the lienor. They coupled their answer with a counterclaim for compensatory and punitive damages based upon

fraud, abuse of process, and outrageous conduct.[1] The Meyers also filed a motion for summary judgment along with a statement of material facts not in dispute. They then amended their counterclaim to allege a cause of action for libel of title. The chancery court ruled that the lienor did not have a contract to grade the Meyers' property and was not entitled to a lien against their property. The court granted the Meyers' motion for summary judgment, after which the lienor released the lien. At the behest of the lienor, the chancery court transferred the Meyers' counterclaim to circuit court ("the trial court"). The lienor then filed a motion for judgment on the pleadings on the ground that the statements in the notice of contractor's lien were "absolutely privileged" because, according to the lienor, they were made in the course of a judicial proceeding. The trial court reserved judgment on the lienor's motion and the matter proceeded to trial.

A bench trial was held on the Meyers' counterclaim. Mr. Meyer testified that he and his wife did not have a contract with the lienor. He also testified that the lienor did not perform any work on the Meyers' property and that the lienor did not bill the Meyers for any of the grading done by Satterfield. Mr. Meyer stated that he had incurred attorney's fees totaling over $6,500 as a result of the lienor's pursuit of his claimed lien rights.

After Mr. Meyer testified, his attorney read into evidence a portion of the lienor's deposition. In his deposition, the lienor testified that, when he realized he was not in a position to do the grading work himself, he introduced the Meyers to Satterfield and recommended to them that they hire his friend to do the job. The lienor stated that he did not expect to receive any monetary compensation directly from the work, but hoped that Satterfield would reciprocate by sending him work in the future. The lienor acknowledged that he did not keep records of Satterfield's hours at the Meyers' property; did not perform any of the work himself; and did not send an invoice to the Meyers.

The lienor testified in person at trial. He again admitted that he personally had not performed any work for the Meyers; however, he persisted in his claim that Satterfield was his subcontractor.[2] The lienor also testified that he contacted Doug Campbell, an attorney and friend, who recommended that the lienor file a lien against the Meyers' property.[3] The lienor did not call Campbell to testify. The reason that the lienor gave for filing the lien was that he "felt like [he] was responsible for [Satterfield] doing the work."

Satterfield testified that he was responsible for performing the grading services. He acknowledged that he and the lienor met with Attorney Campbell. Satterfield stated that Campbell

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[1]Upon motion of the lienor, the chancery court dismissed "[t]he causes of action attempted to be alleged . . . regarding abuse of process, fraud, [and] outrageous conduct . . . for failure to state a claim." The order of dismissal was not appealed.

[2]There was no direct evidence of this other than the lienor's testimony.

[3]This testimony was offered in support of the lienor's theory that he filed the lien based upon the advice of counsel. In view of our disposition of this case, we do not find it necessary to decide whether advice of counsel is a defense to a libel of title action. *Cf.* ***Rowland v. Lepire***, 99 Nev. 308, 314, 662 P.2d 1332, 1336 (1983).

advised the lienor to file the lien in the lienor's name because, according to Campbell, the lienor was the one who was ultimately responsible for the work.

Following the trial, the court held that the lienor was guilty of defaming the Meyers' title. It entered a judgment in their favor for $7,400. The trial court also filed a memorandum opinion, which contains the following findings:

> The only disputed fact in this case is to the elements of this action for slander of title. Basically, everybody agrees, based upon the Chancellor's opinion in Chancery Court, every element exists without contest, except the only issue of contest here is whether that action was taken with malice. Malice may be inferred or direct proof. As the cases indicate, malice may be taken from not an actual malice against the person but a substantial disregard and recklessness in dealing with the title or ownership of another piece of property or their right to ownership.
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> . . . I can understand how the [lienor] and the defendant now sort of felt some responsibility, because he is saying he couldn't do this work, so he sent his friend up there to see this neighbor about doing some work. But I cannot escape the fact that he knew he did not do any of the work. He was not the contractor. He didn't negotiate the price or the amount of the work. He says he was trying to help out a friend. I have to take him at his word at that point. But he knew he wasn't the contractor. He knew he hadn't done any work on this property. Then he says, and that's the only proof before me, both he and Mr. Campbell--he and Mr. Satterfield--excuse me–went and saw Mr. Campbell and told him all of these facts this Court heard. And he says Mr. Campbell said to file a lien. That's the reason I raised the question I did.
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> Two wrongs do not make a right. One should not be able to shield themselves from behind the act an another. If Mr. Campbell told him that on these facts, the substantial question is raised about his culpability and liability for what happened. We did not hear from Mr. Campbell. That's the reason I raised the question with Mr. Boone, who is a partner in the same law firm, who filed the lien, defended the action in Chancery and is here today defending this, about where we stand if I find there is a validity of this claim for slander of title, not because of actual malice that [the lienor] has against Mr. Meyer, but for a reckless disregard for their title and ownership, considering the facts that he knew. And I find there was a reckless disregard. He knew he wasn't the contractor. He hadn't done any work. And he

> cannot – should have know[n] and I think he did know he couldn't file this lien.

The trial court subsequently reduced the Meyers' award from $7,400 to $4,600. The court also awarded the Meyers discretionary costs of $733.50, resulting in a total award to the Meyers of $5,333.50.

II.

The lienor raises four issues for our review. As taken from his brief, the issues are as follows:

> 1. Whether a Notice of Contractor's Lien that is the subject of suit to enforce the lien is a statement made preliminary to or in the course of a judicial proceeding entitling the filer to the defense of absolute privilege in a libel of title action?
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> 2. Whether the reliance on the advice of counsel, honestly sought on all material facts, precludes a finding of malice in libel of title action?
>
> 3. Whether the evidence preponderated against the trial court's finding that [the lienor] filed the Notice of Contractor's Lien with malice and libeled the Meyers' title to real property?
>
> 4. Whether the trial court erred in awarding the Meyers attorney fees as damages for libel of title where the Meyers did not bring an action to quiet title but only defended an action for breach of contract and to enforce a lien?

As a separate issue, the Meyers challenge the propriety of the trial court's action in reducing their damage award from $7,400 to $4,600. We hold that the lienor's first issue is dispositive. We pretermit consideration of the remaining issues raised by the parties.

III.

In this non-jury case, our review is *de novo* upon the record of the proceedings below; but the record comes to us accompanied by a presumption of correctness as to the trial court's factual determinations, a presumption we must honor unless the evidence preponderates otherwise. Tenn. R. App. P. 13(d); ***Wright v. City of Knoxville***, 898 S.W.2d 177, 181 (Tenn. 1995). Our review of questions of law is *de novo* with no such presumption of correctness attaching to the trial court's conclusions of law. ***Campbell v. Florida Steel Corp.***, 919 S.W.2d 26, 35 (Tenn. 1996).

IV.

The lienor argues that the trial court erred in failing to find that "statements made in [the] notice of lien which is the subject of a suit to enforce the lien are part of [a] judicial proceeding," entitling the lienor "to the defense of absolute[] privilege in a suit for libel of title." Specifically, the lienor contends that when he sued the Meyers, the "lien became an inseparable part of the suit to enforce the lien." Thus, the lienor argues, "statements [in the lien] became absolutely privileged as being in the course of or preliminary to a judicial proceeding." The Meyers strenuously argue that the subject false statements are not entitled to the absolute privilege.

V.

The Meyers seek to sustain a claim against the Meyers for libel[4] of title. Such a cause of action is recognized as an actionable tort in Tennessee and has been so recognized for many years. ***Ezell v. Graves***, 807 S.W.2d 700, 701 (Tenn. Ct. App. 1990) (citing ***Smith v. Gernt***, 2 Tenn. C.C.A. 65 (1911)). In a libel of title action, a plaintiff must prove the following:

> (1) that it has an interest in the property, (2) that the defendant published false statements about the title to the property, (3) that the defendant was acting maliciously, and (4) that the false statements proximately caused the plaintiff a pecuniary loss.

Harmon v. Shell, C/A No. 01A01-09211-CH-00451, 1994 WL 148663 at *4 (Tenn. Ct. App. M.S., filed April 27, 1994) (citations omitted). In the instant case, the trial court held that the elements of the cause of action were made out by the proof. We do not find it necessary to determine whether the evidence preponderates against any of the trial court's factual findings. However, we do note that which is abundantly clear – the subject contractor's lien contains material assertions that are false, not the least of which is the lienor's statement that he had a "direct contract with [the Meyers]." We have concluded, however, that these false statements are absolutely privileged and, therefore, cannot form the basis for a monetary judgment against the lienor, even assuming all of the elements of a libel of title action are present.

VI.

In most, if not all, American jurisdictions – including Tennessee – "statements made in the course of judicial proceedings which are relevant and pertinent to the issues are absolutely

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[4] We focus on "libel" of title because the instant case involves a writing. With respect to the basis upon which we decide this case, what we say about libel of title applies with equal force to slander of title. In fact, the phrases "libel of title" and "slander of title" seem to be used interchangeably in the cases. The action is sometimes referred to as one for disparagement of title. *See* ***Albertson v. Raboff***, 46 Cal.2d 375, 295 P.2d 405, 408 (1956). We have previously held that this cause of action, regardless of the label placed upon it, is a species of a claim for "injurious falsehood." *See* ***Wagner v. Fleming***, C/A No. E2002-02304-COA-R3-CV, 2004 WL 32379 at *6 (Tenn. Ct. App. E.S., filed January 6, 2004) (Tenn. R. App. P. 11application pending).

privileged, and therefore cannot be used as a basis for a libel action for damages." ***Jones v. Trice***, 210 Tenn. 535, 538, 360 S.W.2d 48, 50 (Tenn. 1962); *see also* ***Myers v. Pickering Firm, Inc.***, 959 S.W.2d 152, 159 (Tenn. Ct. App. 1997). This is true even if the statements are "known to be false or even malicious." ***Jones***, 210 Tenn. at 538, 360 S.W.2d at 50 (citing ***Hayslip v. Wellford***, 195 Tenn. 621, 263 S.W.2d 136 (Tenn. 1953)). It is said that the policy underlying this rule is

> that access to the judicial process, freedom to institute an action, or defend, or participate therein without fear of the burden of being sued for defamation is so vital and necessary to the integrity of our judicial system that it must be made paramount to the right of an individual to a legal remedy where he [or she] has been wronged thereby.

Jones, 360 S.W.2d at 51. We have recognized that the rule of absolute privilege may well leave a wronged individual with no remedy. It is said that this situation is just one of a number of instances "where the rights of the individual are required to be sacrificed for the public good." ***Id***. at 52 (quoting from ***Crockett v. McClanahan***, 109 Tenn. 517, 531, 72 S.W. 950, 953 (1903)).

As can be seen from the recitation of the rule of absolute privilege for defamatory statements in judicial proceedings, such statements must possess two characteristics to qualify for the privilege:

> (1) It must be in the course of a judicial proceeding, and (2) it must be pertinent or relevant to the issue involved in said judicial proceeding.

Jones, 360 S.W.2d at 52. "Relevant," as that word is used in the above quote, means "reasonably relevant to the judicial proceedings." ***Id***. at 54. Pertinency and relevance are questions of law. ***Id***. at 53.

In ***Myers***, the court was asked to decide whether an expert's written report issued in furtherance of litigation is entitled to the protection of the absolute privilege accorded to statements made in judicial proceedings. ***Myers***, 959 S.W.2d at 158-59. In concluding that the report was entitled to the privilege, we quoted, with approval, from the Restatement (Second) of Torts § 587 (1977), which section, in its entirety, is as follows:

> A party to a private litigation or a private prosecutor or defendant in a criminal prosecution is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding, or in the institution of or during the course and as a part of, a judicial proceeding in which he participates, if the matter has some relation to the proceeding.

Myers, 959 S.W.2d at 159. ***Myers*** expressly stands for the proposition that "communications preliminary to proposed or pending litigation" are absolutely privileged. ***Id.*** at 161. While ***Myers***

involved a traditional defamation of person action, we find the holding in that case to be instructive with respect to this libel of title action.

VII.

We have found no caselaw in Tennessee addressing the issue of whether the serving and recording of a lien on real property, when followed by the timely filing of a suit to enforce the lien, is a part of judicial proceedings so as to clothe statements in the lien with absolute immunity from suit for libel of title. This issue, however, has been addressed by a number of other jurisdictions.

In ***Donohoe Constr. Co. v. Mount Vernon Assocs.***, 235 Va. 531, 369 S.E.2d 857 (1988), the Supreme Court of Virginia addressed the issue now before us. In ***Donohoe***, the plaintiff sued the defendant alleging, *inter alia*, slander of title. ***Donohoe***, 369 S.E.2d at 858. The "slander of title" action was predicated on the fact that the defendant had filed a memorandum of mechanic's lien and followed it up with "a bill of complaint to enforce the lien." ***Id***. at 859. The court in the underlying action determined that the lien was invalid. ***Id***. at 860. In the trial of the slander of title action that followed, a jury returned a verdict against the lienor for compensatory and punitive damages. ***Id***. at 858.

On appeal, the Supreme Court of Virginia reversed the trial court's judgment on the jury's verdict and entered a judgment for the defendant. ***Id***. at 863. The High Court noted that "a duly perfected mechanic's lien will be extinguished unless the suit to enforce is timely filed."[5] ***Id***. at 861. The court in ***Donohoe*** held that the statements in the memorandum of mechanic's lien were absolutely privileged:

> [W]e conclude that the filing of the memorandum of mechanic's lien constitutes a judicial proceeding. As previously noted, it is a prerequisite to a suit to enforce. For a claimant to obtain the remedy provided by statute, he must *perfect* his lien and, thereafter, sue to *enforce* it. The two proceedings are inseparable.
>
> The inquiry does not end with our finding that the perfection of a lien constitutes a judicial proceeding. To be entitled to an absolute privilege, the words employed must be relevant and pertinent to the case. We have adopted a liberal rule in determining the degree of relevancy or pertinency necessary to bring a matter within the privilege. Thus, the matter to which the privilege does not extend must be so palpably wanting in relation to the matter in controversy that no reasonable man can doubt its irrelevancy and impropriety. This is so because public policy demands that within all reasonable limits a litigant should have the right to state his case as he sees fit.

[5] Such is also the case in Tennessee.

> Applying these principles to the present case, we find that the statements contained in the memorandum were relevant and pertinent. Indeed, these statements were mandated by statute.
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> We conclude, therefore, that Mount Vernon cannot recover on its slander of title claim. Because the statements in the memorandum were absolutely privileged, the trial court erred in refusing to strike Mount Vernon's evidence as it related to the slander of title count.

Id. at 861-62. (internal quotation marks and bracketing omitted) (citations omitted) (emphasis in original).

A California intermediate appellate court reached the same result in the case of ***Frank Pisano & Assoc. v. Taggart***, 29 Cal. App. 3d 1, 105 Cal. Rptr. 414 (1972). In ***Pisano***, the claimants filed a "mechanic's claim of lien" for recordation. ***Pisano***, 105 Cal. Rptr. at 419. They subsequently filed a complaint to enforce their lien. ***Id***. at 420. The defendants in the lien lawsuit filed a cross-complaint against the lien claimants asserting that the mechanic's lien was improperly filed and that the filing created a cloud on their title which prevented them from selling their property. ***Id***. at 421-22. The trial court denied the cross-complainants relief. ***Id***. at 422.

On appeal, the California appellate court, in agreeing that the cross-complainants could not pursue a claim for disparagement of title, cited a California statute that essentially codifies the common law absolute privilege accorded judicial proceedings. ***Id***. at 430. The California intermediate appellate court relied upon a decision of the Supreme Court of California holding that a notice of lis pendens "was privileged within the meaning of [the California statute]." ***Id***. The intermediate appellate court quoted the following from the Supreme Court's decision:

> It is our opinion that the privilege applies to any publication, such as the recordation of a notice of *lis pendens*, that is required, . . . or permitted, . . . , by law in the course of a judicial proceeding to achieve the objects of the litigation, even though the publication is made outside the courtroom and no function of the court or its officers is invoked. Thus, it is not limited to the pleadings, the oral or written evidence, to publications in open court or in briefs or affidavits. If the publication has a reasonable relation to the action and is permitted by law, the absolute privilege attaches.

Id. (quoting ***Albertson v. Raboff***, 46 Cal. 2d 375, 295 P.2d 405, 409 (1956)). The California intermediate appellate court reached the following conclusion pertaining to the lien in that case:

> Applying this reasoning to the instant case, it must be concluded that the filing of a claim of mechanic's lien *in conjunction with a judicial proceeding to enforce it* is privileged within the meaning of Civil

> Code section 47, subdivision 2. The recording of the claim of lien is clearly authorized by law (see former s 1193.1) and it is related to an action to foreclose. (See former s 1198.1.)
>
> We conclude, therefore, that the absolute privilege attached in the present case. The filing of a mechanic's lien was permitted by law and it had a reasonable relation to an action to foreclose the lien. Any deficiencies in the lien procedure were a matter of defense to the action and did not militate against the privilege.

Id. (emphasis added).

The ***Donohoe*** and ***Pisano*** courts both dealt with the filing of a mechanic's lien *followed by a suit to enforce the lien*. Other courts have indicated that, if presented with a similar factual scenario, they would reach the same result, either under their common law or a state statute. *See, e.g.,* ***Peters Well Drilling Co. v. Hanzula***, 242 N.J. Super. 16, 575 A.2d 1375, 1385-86 (1990) ("In the case before us, had plaintiff, as did the claimant in ***Donohoe***, perfected its lien and sought to enforce it by suit, the contents of the notice would be absolutely privileged no matter what the merits, limited only by the principle that the 'words spoken or written in [the] judicial proceeding' must be 'relevant and pertinent to the matter under inquiry. . . .'"); ***Simmons v. Futral***, 262 Ga. App. 838, 586 S.E.2d 732, 734 (2003) ("Taking into account the principles and precedents stated by Georgia's appellate courts, the varying approaches of our sister states, and our own lien statutes, we find that a lien is not a pleading for purposes of [the Georgia statute granting an absolute privilege to pleadings], and statements made within it are not afforded absolute privilege, *until* the lien becomes attached to a law suit and *verified* notice of the suit is filed under [the Georgia statute granting a lien to a surveyor]." (emphasis in original)).

Some states have focused on whether the *mere* filing of a lien is a statement in the course of a judicial proceeding protected by an absolute privilege. *See* ***Gregory's, Inc. v. Haan***, 545 N.W.2d 488, 494 (S.D. 1996) (holding that a conditional, rather than an absolute, privilege applies to the filing of a materialman's lien and further holding that the filing of such a lien, in and of itself, is not a judicial proceeding); *see also* ***Jeffrey v. Cathers***, 104 S.W.3d 424, 430 (Mo. Ct. App. 2003) ("we cannot say the filing of the mechanic's lien is absolutely privileged").[6]

VIII.

We hold that statements in a lien served and filed pursuant to Tenn. Code Ann. § 66-11-101, *et seq*., are absolutely privileged when, as here, a suit is timely filed to enforce the lien. In so

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[6]The Meyers cite and rely upon the decision of ***Estate of Gordon v. Grosklaus***, 163 Wis. 2d 1095, 474 N.W.2d 530 (Wis. Ct. App. 1991). That case is in North Western Reporter in a table captioned "Wisconsin Court of Appeals Table of Unpublished Opinions." Under Rule 809.23(1)(b)(5) of Wisconsin Rules of Civil Procedure, that case has no precedential value. Accordingly, we will not further notice it.

holding, we find particularly persuasive the decision of the Supreme Court of Virginia in the ***Donohoe*** case. We agree with the Virginia court that once suit is filed to enforce a lien, the lien is "inseparable" from the suit. ***Donohoe***, 369 S.W.2d at 861. We also agree with the Virginia court that statutorily-mandated statements in a lien are "relevant and pertinent" to a subsequently filed complaint to enforce the lien. ***Id***.

Our holding is also buttressed by our decision in ***Myers***. There we held, in a defamation of person action, that "communications preliminary to proposed or pending litigation" are absolutely privileged. ***Myers***, 959 S.W.2d at 161. In so holding, we relied on Restatement (Second) of Torts § 587 (1977). That section of the Restatement recites, in part, that one "is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding." It is clear to us that a contractor's lien, when subsequently coupled with a suit to enforce the lien, is a "communication[] preliminary to a proposed judicial proceeding." ***Id***. We see no reason to differentiate between a defamation of person action and a libel of title action, at least as far as the issue under discussion is concerned.

A libel of title action focuses on words – the vehicle by which facts are communicated.[7] Sometimes those words are communicated orally and sometimes they are expressed in written form. In any event, the gravamen of the libel of title action is that communicated facts have disparaged one's title to real property. Obviously, a disparaging statement can be totally unrelated to a legal proceeding. In ***Wagner v. Fleming***, C/A No. E2002-02304-COA-R3-CV, 2004 WL 32379 (Tenn. Ct. App. E.S., filed January 6, 2004) (Tenn. R. App. P. 11 application pending), we held that statements on signs were not false and hence not actionable, ***id***. at *8; but had those statements been false and had the other elements of a libel of title action been present, those statements would have formed the basis for the successful pursuit of a libel of title action.

Libel of title actions pertain to injurious statements regarding real property. It is clear that disparaging statements in legal proceedings are only one species of such injurious activity. However, when such statements, even if false, are made in a legal proceeding, the concept of absolute privilege comes into play and operates as a total bar to a libel of title action based upon those statements. In the case at bar, the communicated facts were false, but they were contained in a notice of lien. Once suit was timely filed to enforce that lien, the lien, and the statements contained therein, were essential elements in "achiev[ing] the objects of the litigation." ***Pisano***, 105 Cal. Rptr. at 430. Absent the proper handling of the notice of lien, there is no viable suit to enforce the lien. In a very real sense, the notice of lien is *more* than relevant to the suit to enforce; it is an absolute prerequisite to the attachment and sale of the debtor's real property in the lien lawsuit.

We recognize that the Supreme Court of Wisconsin, in the case of ***Kensington Dev. Corp. v. Israel***, 142 Wis. 2d 894, 419 N.W.2d 241 (1988), held that a *conditional* privilege, rather than an

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[7] While a libel of title action focuses on *statements* alleged to be injurious to one's title, a malicious prosecution suit pertaining to a civil claim has a different focus. It is aimed at the *pursuit of a lawsuit*. This case does not involve a claim for malicious prosecution.

absolute privilege, applied to statements in a lis pendens notice. ***Id***. at 244. There, the court was dealing with a statute, sec. 706.13(1), Stats., which provided as follows:

> In addition to any criminal penalty or civil remedy provided by law, any person who submits for filing, docketing or recording, any lien, claim of lien, lis pendens, writ of attachment or any other instrument relating to the title in real or personal property, knowing the contents or any part of the contents to be false, sham or frivolous, is liable in tort to any person interested in the property whose title is thereby impaired, for punitive damages of $1,000 plus any actual damages caused thereby.

Id. at 242 n.1. In holding that a conditional, rather than an absolute, privilege applied to actions under the statute, the court noted that, by enacting the statute,

> the legislature has, in effect, modified this doctrine [of absolute privilege] as it relates to the filing of a lis pendens and rendered it a conditional privilege. If the absolute privilege rule is applied, the slander of title statute, sec. 706.13, Stats., would be nullified because it would be virtually impossible to assert a claim if all communications in judicial proceedings relating to property were absolutely privileged. We hold, as did the court of appeals, that when a lawsuit is commenced pursuant to sec. 706.13, the absolute privilege rule does not apply. Rather, a conditional privilege rule applies.

Id. at 244. Tennessee does not have a similar statute. For this reason, ***Kensington*** is not persuasive authority.

We do not need to reach, and do not reach, the issue of whether a lien, which is *not* followed by a suit to enforce, can be the basis for a libel of title suit. The resolution of that issue will have to await another day.

IX.

The judgment of the trial court is reversed and the counterclaim of Gordon L. Meyer and wife, Karen Renee Meyer, is hereby dismissed, with costs at the trial court level being assessed against them. This case is remanded to the trial court for collection of that court's costs. Costs on appeal are also taxed to the appellees, Gordon L. Meyer and wife, Karen Renee Meyer.

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CHARLES D. SUSANO, JR., JUDGE